Filed 3/24/04

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re LUIS C., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. LUIS C., Defendant and Appellant.	F043304 (Super. Ct. No. 0094883-6) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Gary Hoff, Judge.

Michael B. McPartland, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, and John G. McLean, Deputy Attorney General, for Plaintiff and Respondent.

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*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts IA and IIA.

Luis C. appeals from an order extending his commitment to the California Youth Authority (Youth Authority) pursuant to Welfare and Institutions Code section 1800,[1] which permits further detention if the ward would be physically dangerous to the public because of a mental disorder. At trial, an expert testified that Luis suffered from pedophilia, a mental disorder, and that he presented a high risk to harm others if released because he had not completed the sex offender treatment program. The jury made the requisite findings, and the court ordered the extended commitment.[2]

On appeal Luis contends: (1) the extension of his commitment under section 1800 violated due process and equal protection because it is based on a constitutionally inadequate standard of dangerousness and because his commitment involves fewer procedural safeguards and can result in harsher treatment than a civil commitment for similarly situated adult offenders,[3] and (2) the court violated his Fifth Amendment rights when it refused to instruct the jury he had a right not to testify and no inference could be drawn from the fact that he did not. We hold that the standard of "physically dangerous to the public" required for commitment under section 1800 et seq. violates due process (*In re Howard N.*, *supra*, 115 Cal.App.4th at p. ____.) While this holding is dispositive, because the additional question of whether the trial court erred in not instructing the jury

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1 Statutory references are to the Welfare and Institutions Code unless otherwise indicated.

2 The extended commitment will expire March 30, 2004. However, the dispositive issue here is of continuing public concern and likely to recur. Thus, a ruling on the merits is appropriate. (See *In re Christina A.* (2001) 91 Cal.App.4th 1153, 1159.)

3 Luis did not challenge the constitutionality of the statutes in the trial court so technically the issue is waived. (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590.) However, for the sake of judicial efficiency and because our holding in *In re Howard N.* (2004) 115 Cal.App.4th 1134 concludes that the statutory scheme violates due process, we address the merits.

with CALJIC No. 2.60 is a matter of first impression, we determine that instruction should have been given and publish our discussion on this latter subject.

I.

BACKGROUND

A. Youth Authority Statutory Scheme*

(1) Treatment

The Youth Authority Act (§ 1700 et seq.) is designed "to protect society from the consequences of criminal activity and to that purpose community restoration, victim restoration, and offender training and treatment shall be substituted for retributive punishment and shall be directed toward the correction and rehabilitation of young persons who have committed public offenses." (§ 1700.) To this end, when wards are committed to the Youth Authority from juvenile court, the Youth Authority Board (YAB) is statutorily required to provide a treatment plan for them within 60 days of intake. (§ 1766, subd. (b).)

Section 1765 provides that the Youth Authority must "keep under continued study" a ward in its control and retain the ward under its supervision and control only so long as in its judgment that control is necessary for the protection of the public. (§ 1765, subd. (a).) The YAB must discharge a ward as soon as in its opinion there is a reasonable probability that he or she can be given full liberty without danger to the public. (§ 1765, subd. (b).)

The Youth Authority must periodically review the case of each ward for the purpose of determining whether existing orders and dispositions in individual cases should be modified or continued. These reviews must be made as frequently as the Youth Authority considers desirable and at least once a year. (§ 1720, subd. (b).) Annual

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* See footnote on page 1, *ante.*

reviews must be written and must include: "verification of the treatment or program goals … to ensure the ward is receiving treatment … that is narrowly tailored to address the correctional treatment needs of the ward and is being provided in a timely manner that is designed to meet the parole consideration date set for the ward; an assessment of the ward's adjustment and responsiveness to treatment, programming, and custody; a review of the ward's disciplinary history and response to disciplinary sanctions; an updated individualized treatment plan for the ward that makes adjustments based on the review required by this subdivision; an estimated timeframe for the ward's commencement and completion of the treatment programs or services; and a review of any additional information relevant to the ward's progress." (§ 1720, subd. (e).)

Copies of the annual reviews must be provided to the court and the probation department of the committing county. (§ 1720, subd. (f).)

(2) Confinement Time Constraints

If a ward is committed to the Youth Authority by the juvenile court, he or she is entitled to discharge after two years or upon reaching age 21, whichever is later, unless the court orders further detention. (§ 1769, subd. (a).) However, equal protection guarantees require that a ward not be confined for longer than the maximum term of imprisonment that could be imposed on an adult convicted of the same offense that brought the ward within the jurisdiction of the juvenile court. (§§ 731, 1766, subd. (a)(2); *In re John H.* (1992) 3 Cal.App.4th 1109, 1112.)

(3) Extended Confinement

However, if the YAB determines that a ward's discharge at the time required by section 1769 would be physically dangerous to the public because of the ward's mental or physical deficiency, disorder, or abnormality, it requests the prosecuting attorney to file a petition, with supporting statement of facts, to the committing court for an order directing that the ward remain subject to the Youth Authority's control. (§ 1800.) The supporting statement of facts generally includes one or more psychiatric or psychological opinions, a

summary of disciplinary actions taken against the ward during his confinement with the Youth Authority, and a description of the offenses committed before incarceration. (Cal. Juvenile Court Practice (Cont.Ed.Bar 1981) § 10.51, p. 314.)

The ward is entitled to two separate hearings on the question of whether he or she is physically dangerous. If the court determines that the petition on its face supports a finding of probable cause, it orders a probable cause hearing to be held within 10 days. (§ 1801, subd. (a).) The court notifies the ward, who may appear with retained or appointed counsel, cross-examine witnesses, and present relevant witnesses and evidence. (*Ibid*.)

At the first hearing, the court decides whether there is probable cause to believe that discharge of the ward would be physically dangerous to the public because of the ward's mental or physical deficiency, disorder, or abnormality. If probable cause exists, a trial is ordered. If not, the court dismisses the petition and the person is discharged from the Youth Authority at the time required by section 1769. (§ 1801, subd. (b).)

If the court orders a trial, that trial is by jury unless waived by both parties. The only issue for the trier of fact is whether the ward is "physically dangerous to the public because of his or her mental or physical deficiency, disorder, or abnormality." (§ 1801.5.) At trial, the ward is "entitled to all rights guaranteed under the federal and state constitutions in criminal proceedings," and a unanimous verdict and proof beyond a reasonable doubt are required. (*Ibid*.)

The period of continued detention is limited to two years. Within that time the Youth Authority may file a new application. Applications to continue detention may be filed repeatedly at intervals as often as in the opinion of the YAB may be necessary for the protection of the public. To protect other wards, the Youth Authority is authorized to transfer the custody of any person over 21 years of age to the Director of Corrections for placement in the appropriate institution. (§ 1802.) However, the ward remains under the control of the Youth Authority even if placed in another institution. (§ 1758.)

The rule that a juvenile ward may not be committed for a period in excess of that to which an adult may be sentenced for the same offense limits only the initial period of detention. It does not limit the extended commitment of dangerous persons under section 1800. (*People v. Superior Court (Vernal D.)* (1983) 142 Cal.App.3d 29, 33.)

An order of continued detention may be appealed by the person detained, who remains under control of the Youth Authority pending appeal. (§ 1803.)

By way of comparison, section 1780 provides an alternative method for continuing the confinement of wards who pose a danger to the public but who do not suffer from the required mental or physical disorder necessary to invoke a commitment extension under section 1800. If the YAB believes that unrestrained freedom for such a ward poses a danger to the public, the Youth Authority files a petition with the committing court accompanied by a statement of facts on which the Youth Authority bases its opinion. (§ 1780.) The committing court notifies the ward and affords him or her an opportunity to appear in court with counsel and to compel the attendance of witnesses and production of evidence. (§ 1781.) The court then has several options. It may discharge the ward, grant probation, or order him or her committed to state prison. (§ 1782.) If committed to state prison, the ward's maximum term of imprisonment cannot exceed the maximum term prescribed by law for the offense for which he or she was committed, with credit for the period of time he or she was under Youth Authority control. (*Ibid*.; *Chaparro v. Superior Court* (1990) 218 Cal.App.3d 560, 568.)

B. Facts and Proceedings

In 1999, 19-year-old Luis admitted an allegation that he had molested his younger sister for more than four years, which constituted the crime of continuous sexual abuse of a child (Pen. Code, § 288.5, subd. (a)). The juvenile court committed him to the Youth Authority for a maximum period of confinement of 16 years.

Under section 1769, subdivision (a), Luis was scheduled to be released from the Youth Authority on his 21st birthday on March 30, 2002. Based on the report of the

Youth Authority Board (YAB), in December 2001, the Fresno County District Attorney filed a petition to extend Luis's commitment pursuant to section 1800 et seq.

The YAB had determined there was cause to believe that Luis would be physically dangerous to the public by reason of a mental disorder if discharged from the control of the Youth Authority. The bases for the determination were set forth in a six-page, single-spaced case report and a six-page, single-spaced psychological report. The reports noted that Luis suffered from pedophilia and schizoid personality disorder. The latter is characterized by caring little for social relationships, indifference to others, and a lack of remorse or guilt that would normally accompany a deed that causes harm to another person. In addition, he had not responded to treatment for the majority of his stay at the Youth Authority and required further treatment in a formal sex offender treatment program in order to have a viable relapse prevention plan and to safely transition into the community.

The juvenile court found the petition supported a finding of probable cause and set the matter for hearing. After a contested hearing, which included testimony from a treating psychologist expanding on the opinions set forth in the written reports, the court found probable cause to believe that Luis's discharge would be physically dangerous to the public because of his mental disorder or abnormality.

Luis requested a jury trial on the issue. Before trial commenced in January 2002, however, Luis agreed to accept a two-year extension of inpatient treatment until March 30, 2004, as recommended by the YAB. He further agreed to return to court in one year for a review and status hearing. A year later, Luis withdrew his waiver and requested a jury trial.

During the three-day trial, Luis's therapist and three Youth Authority counselors testified. Youth Authority psychologist Steven Herskovic, who treats sex offenders, found Luis to be at risk for harming others because of his diagnosis of pedophilia and the serious nature of his offense--his almost five-year history of molesting his sister by use of

threats and force to intimidate and coerce her. In addition, Luis displayed other elements of an offender profile. He had briefly molested two of his sister's friends and had reported that he had been sexually abused himself and that he had engaged in animal torture. These elements needed to be addressed in therapy. Further, staff had reported that, in the past, Luis had been grooming a somewhat retarded ward to sexually act out, which supported the opinion that he was dangerous.

Other evidence established that he had been angry with his family for obtaining a restraining order against him and, in the past, had expressed a desire to kill them when he was released. Luis also showed signs of depression. According to Dr. Herskovic, individuals who are depressed or suicidal and who also have repressed anger can sometimes turn their anger toward others in some sort of violent act. On the other hand, Luis was a well-behaved ward who had never been disciplined while in custody. Recently, he had appeared motivated in treatment. However, he was in the early stages of the sex offender treatment program, which usually lasted at least 30 months.

Patrick Mayer, a correctional counselor with the Youth Authority assigned to the sex offender program, had Luis as one of his seven wards. He testified that Luis still showed little concern for his victim and did not understand why his family wanted no contact with him. Luis had a number of behavioral issues that still needed to be addressed before he could safely be released to the community.

Luis did not testify during the trial. Accordingly, he requested the court to instruct the jury with CALJIC No. 2.60, which explained that he had a constitutional right not to testify and that no inference could be drawn from his failure to testify. The court refused, finding that Luis did not have a constitutional right not to be called as a witness, so the instruction was inapplicable.

The jury found that Luis had a mental or physical defect, disorder, or abnormality and that by reason of such mental condition he represented a physical danger to the

public within the meaning of section 1801.5. On those findings, the court extended his commitment until March 30, 2004.

II.

DISCUSSION

A. Unconstitutional Statutory Standard*

Luis contends that the statutory definitions of dangerousness necessary to justify continued confinement for juvenile offenders are much less precise and stringent than those for adult offenders. This less stringent standard, claims Luis, is constitutionally inadequate. To extend a juvenile offender's confinement, the fact finder need only find that the ward "is physically dangerous to the public because of his … mental or physical deficiency, disorder, or abnormality." (§ 1801.5.) In contrast, an adult cannot be civilly confined as a mentally disordered offender (MDO) unless the fact finder determines that the person has a severe mental disorder and that by reason of such severe disorder, the person represents a substantial danger of physical harm to others. (Pen. Code, § 2972, subd. (c).) Similarly, a person cannot be committed as a sexually violent predator (SVP) unless the fact finder determines that the person has a serious present difficulty controlling sexually violent and predatory conduct such that he poses a serious and well-founded risk of committing a sexually violent predatory crime if released from custody. We agree that the section 1801.5 standard for an extended commitment is constitutionally inadequate. (*In re Howard N.*, *supra*, 115 Cal.App.4th at p. ___.)

Consistent with substantive due process, the state may involuntarily commit persons who as a result of mental impairment are dangerous to others. The state's interest in providing treatment and protecting the public prevails over the individual's interest in being free from compulsory confinement. (*Hubbart v. Superior Court* (1999)

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* See footnote on page 1, *ante.*

19 Cal.4th 1138, 1151.) Dangerousness alone, however, is not a constitutionally sufficient ground to justify indefinite involuntary commitment. The dangerousness must be the result of a mental impairment. (*Id*. at p. 1155.) Moreover, the link between mental impairment and public danger must be proven to the point that the mental disorder causes a likelihood the committed person will reoffend. (*Id*. at p. 1158.) The mental impairment requirement serves to limit involuntary civil commitment to those who suffer from a volitional impairment rendering them dangerous beyond their control. (*Kansas v. Hendricks* (1997) 521 U.S. 346, 358.) If individuals could be civilly confined as dangerous without any disorder-related difficulty in controlling their dangerous behavior, there would be no adequate distinction from typical recidivists who are subject exclusively to the criminal law. (*Kansas v. Crane* (2002) 534 U.S. 407, 412-413.) The federal Constitution prohibits the involuntary confinement of persons on the basis that they are dangerously disordered without proof that they have serious difficulty in controlling their dangerous behavior. (*Id.* at p. 413; *People v. Williams* (2003) 31 Cal.4th 757, 759.) Thus, in order for a civil commitment scheme to meet constitutional requirements, it must link future dangerousness to a mental abnormality that impairs behavioral control. (*Id.* at p. 773.)

In *In re Howard N.*, *supra*, 115 Cal.App.4th 1134, we found that section 1800 et seq. did not meet the constitutional standard. (*Id.* at p. ____.) Section 1801.5 permits a ward's extended commitment on a finding that the ward would be "physically dangerous to the public because of his or her mental or physical deficiency, disorder, or abnormality." (*Ibid.*) To make such a finding under this section, the finder of fact is not required to "determine whether the mental illness or abnormality causes the potential committee to have serious difficulty controlling his or her behavior and whether this loss of control results in a serious and well-founded risk of reoffense." (*Howard N.*, *supra*, at p. ____.) Thus, the section 1801.5 standard permitting a ward's extended commitment violates due process. (*Howard N.*, *supra*, at p. ____.)

We also concluded that the statutory deficiency rendered the jury instructions inadequate. Because the jury was instructed only in the statutory language, there were no instructions defining any terms that conveyed the constitutional principles. (Cf. *In re Howard N.*, *supra*, 115 Cal.App.4th at p. ____ with *People v. Putnam* (2004) 115 Cal.App.4th 575, 582 [instructing jury with applicable statutory language adequately informed jury of the kind and degree of risk that must be present to extend an MDO commitment].) Further, the omissions were not harmless beyond a reasonable doubt. The only expert at trial testified that Howard's diagnosis was paraphilia not otherwise specified and, because of this untreated sexual disorder, he was physically dangerous to the public. Such testimony did not address the issues ignored by the statute but required by the Constitution. Thus, the jury was not provided with the necessary information to impose a valid civil commitment. (*Howard N.*, *supra*, at p. ____.)

The same deficiencies are present in this case. Dr. Herskovic testified that Luis was a diagnosed pedophile, who also suffered from depression. Luis was in an early stage of sex-offender treatment. Dr. Herskovic explained that the aim of treatment was to have the ward empathize with his victim and appreciate and acknowledge the factors that lead to the assaults so that the ward could develop a very detailed relapse prevention plan before he returned to the community. While the doctor opined it is very difficult for a pedophile not to reoffend, he did not explain how Luis's mental disorders related to lack of control and whether that lack of control resulted in a well-founded risk of reoffense. While the jury might have inferred that an untreated pedophile would have serious difficulty controlling his behavior thereby creating a serious and well-founded risk of reoffense, such inference would be speculative. There was no expert testimony explaining how the diagnosed mental disorder of pedophilia affected emotional or volitional capacity, which would predispose Luis to reoffend. Thus, Luis's jury was not provided with the necessary information to impose a valid civil commitment.

Accordingly, Luis's extended commitment order must be reversed because it was based on the constitutionally inadequate standard set forth in section 1801.5.

Issues pertaining to equal protection are moot in light of this holding.

B. Instruction on Right Not to Testify

Luis contends the court erred in refusing to instruct the jury that he had a constitutional right not to testify and that no inference could be drawn from his failure to testify. We address this issue to give guidance to trial courts in future cases.

In relevant part, section 1801.5 provides: "If a trial is ordered pursuant to Section 1801, the trial shall be by jury unless the right to a jury trial is personally waived by the person, after he or she has been fully advised of the constitutional rights being waived, and by the prosecuting attorney, in which case trial shall be by the court…. The court shall submit to the jury, or, at a court trial, the court shall answer, the question: Is the person physically dangerous to the public because of his or her mental or physical deficiency, disorder, or abnormality? … *The person shall be entitled to all rights guaranteed under the federal and state constitutions in criminal proceedings.* A unanimous jury verdict shall be required in any jury trial. As to either a court or a jury trial, the standard of proof shall be that of proof beyond a reasonable doubt." (Italics added.)

Here, the Legislature's words are clear and unambiguous, the person "is entitled to all rights guaranteed under the federal and state constitutions in criminal proceedings." A defendant in a criminal matter has an absolute right not to be called as a witness and not to testify. (U.S. Const., 5th Amend; Cal. Const., art. I, § 15; Evid. Code, § 930.) When a criminal defendant exercises the right not to testify, the court must instruct the jury not to draw an adverse inference from the defendant's failure to take the stand. (*Carter v. Kentucky* (1981) 450 U.S. 288, 300; *People v. Evans* (1998) 62 Cal.App.4th 186, 190-191.) Under the plain language of section 1801.5, because Luis is entitled to all the rights guaranteed to a criminal defendant, he had the right not to testify at the extended

commitment trial and the court was obligated to instruct the jury with CALJIC No. 2.60 that he had that right and no inference could be drawn from the fact that he did not testify.

Several courts have construed similar language in the civil commitment statutory scheme for those found not guilty by reason of insanity and concluded that it did not make all rights guaranteed for criminal proceedings applicable in the extension proceedings. (See e.g., *People v. Superior Court* (*Williams*) (1991) 233 Cal.App.3d 477 (*Williams*), *People v. Powell* (2004) 114 Cal.App.4th 1153, and cases cited therein.) In *Williams*, the court stated that although many constitutional protections relating to criminal proceedings are available in extension proceedings, the application of all such protections was not mandated by language that the person "is entitled to the rights guaranteed under the federal and State Constitutions for criminal proceedings." According to *Williams*, that phrase merely codified the application of constitutional protections to extension hearings mandated by judicial decision. It did not extend the protection of constitutional provisions that bear no relevant relationship to the proceedings. (*Williams*, *supra*, 233 Cal.App.3d at p. 488.)

In *People v. Haynie* (Mar. 18, 2004, F043306) ____ Cal.App.4th ____, we disagreed with the statement in *Williams* that the statutory language "merely codifies the application of constitutional protections to extension hearings mandated by judicial decision." (*Williams*, *supra*, 233 Cal.App.3d at p. 488.) We reasoned that such conclusion rendered the statutory declaration of rights surplusage and supplanted the legislative rights-inclusive language with a process whereby judges selected which rights would apply. If the Legislature did not intend that "all rights" apply, it--rather than the court--should specify which rights applied. Finally, that the courts had extended certain rights to commitment proceedings under constitutional principles did not prevent the Legislature from providing additional rights to those subjected to the proceedings. (*People v. Haynie*, *supra*, at p. ____.)

For the same reasons, we conclude in this case that the trial court erred when it refused Luis's request to instruct the jury pursuant to CALJIC No. 2.60 that he had a right not to testify and that no adverse inference could be drawn from his decision not to testify.

III.

DISPOSITION

The judgment is reversed.

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VARTABEDIAN, Acting P. J.

WE CONCUR:

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BUCKLEY, J.

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CORNELL, J.